THE STATE
versus
LUCIA MISI

HIGH COURT OF ZIMBABWE
MUZENDA AND SIZIBA JJ
MUTARE, 13 DECEMBER 2024

CRIMINAL REVIEW

SIZIBA J: Whenever criminal allegations are being levelled against an accused person, it is important that all those who are enjoined to play a part in the administration of justice should ensure not only that the facts alleged constitute an offence but that a proper charge is put to an accused person. A case without a proper charge is like a house that is built on sand. There is also a further obligation upon the trier of fact to ensure that the evidence or proven facts match the alleged charge before an accused person can be convicted and it should be demonstrated and justified according to legal principles how this conclusion is arrived at. To complete this whole equation, the punishment meted out to an accused person should also relate to both the charge and the facts proven as well as the applicable law.

The case at hand is very pathetic. The accused person is a young woman aged 32 years who was dragged to Murambinda Magistrates Court to answer a charge of unreasonable disposal of household effects or other property in which the complainant has an interest in contravention of s 3 (1)(k) as read with s 4(1) of the Domestic Violence Act [*Chapter 5*:*16*]. It was alleged that on 10 October 2024, she proceeded to the complainant's house and took some furniture which included a bed, a television stand, 2 pushing trays, kitchen tables, kitchen chairs, a kitchen unit and cash amounting to US$1 500 which was allegedly inside the kitchen unit drawer. She pleaded not guilty to the charge but she was found guilty of the crime after a full trial. She was sentenced to 24 months imprisonment of which 8 months was suspended for 5 years on condition that she does not commit any offence involving the unreasonable disposal of household effects upon conviction which she could be sentenced to imprisonment without the option of a fine. A further 10 months was suspended on condition that she restitutes to the

complainant the sum of US$1 500 on or before 30 January 2025. The remaining 6 months was suspended on condition of performance of 210 hours of community service at Murambinda Magistrates Court.

What was prominent among the review documents that landed on my IECMS portal was a letter from the Provincial Magistrate in Manicaland Province wherein the learned Provincial Magistrate was already quiring the propriety of the order of restitution for the US$1 500 on the basis that there could have been a possibility of an injustice. From a reading of the entire proceedings, it is clear that the learned Provincial Magistrate was correct in questioning the trial magistrate's order of restitution and there is more to it than that.

THE EVIDENCE ON RECORD

The accused person was complainant's wife. The accused maintained that the complainant was her husband. The complainant's testimony was that that the accused was her former wife. What is common cause is that the accused and the complainant had been living together as husband and wife at the place or house where the complainant resides. The record does not show the type of marriage that the accused and the complainant had contracted. When the offence was allegedly committed, the complainant was now living with another woman as his new wife whilst the accused person had relocated to another place to reside at. It is not in dispute that on the date alleged, the accused person came to the house where the complainant resided with a lorry and some two individuals and loaded the furniture items when the complainant had gone out of the house. The accused person found the complainant's new wife at the place and explained to her that she had come to collect her items. The new mistress of the house did not resist and she even assisted them to load those items on the lorry. There was a dispute between the accused and the complainant as to who among them was the owner of some of the items collected which dispute I find not to be material for purposes of this case.

The complainant insisted that he had kept US$1 500 inside the kitchen unit which he now alleges to have also been taken by the accused person when she collected the items from the house. The accused vehemently denied having taken or seen such money.

FINDINGS BY THE TRIAL COURT

The trial magistrate made a finding that the accused person had taken the furniture items as alleged as such was common cause. The trial magistrate's finding concerning the sum of money allegedly taken by the accused was as follows:

> *"The main issue in contention is as to whether or not the taken property included US$1500 cash. According to the complainant, the cash was stashed in the kitchen unit, which property the accused also took along. It is the complainant who can tell us what property he had in his house and there is nothing to disprove his assertions. Here it is the accused who did put herself at the risk of being responsible of whatever the complainant was bound to say concerning his property which she took in his absence without his prior authorization. He is adamant in the kitchen unit was US$1 5OO and accused has nothing to deny or dispute the averment. She therefore will suffer the consequences of her irrational acts with the court having nothing to disregard the averments of the complainant in the issue. The only reasonable inference is that there was money contained in the kitchen unit which the accused took illegally from the complainant's residence."*

It is on the basis of these findings that the accused person was convicted and sentenced as outline above.

THE LAW AND ITS APPLICATION TO THE CASE

The issue relating to the alleged US$1 500 can be easily disposed of on the basis that it was not common cause that such amount was in existence prior to the allegations. The reasoning of the trial magistrate in saying that the accused person took such money simply because of her alleged irrational behavior in collecting the items during the complainant's absence is grossly unreasonable and irrational. According to the trial magistrate, the accused must be accountable for whatever the complainant claimed to have missed simply because she had taken the items when he was not there. She should be answerable according to the trial court even if the complainant would have claimed to have missed a million dollars by mere reason of having taken the items in the absence of the complainant! Such quibbling, to me, is not proper judicial or legal reasoning and also that is not how reasoning by inference under circumstantial evidence should be done. One is left to wonder how the fact of collecting items in the absence of the complainant should translate to proof of having taken the alleged sum of money. There is no logic in trying to link those two facts and hence the trial court's finding

that the accused person took the US$1 500 as well is anchored nowhere and it must be overturned on review.

Furthermore, it did not occur to the trial magistrate that this whole allegation about the US$1 500 could have been a mere smokescreen to spite the accused person who had taken some of the household effects from the complainant who was probably left without a bed to sleep on with his new wife, among other inconveniences. It is not uncommon for those who once enjoyed love together to turn out to be bitter enemies to the extent of fabricating criminal allegations so as to fix one another. For this reason, the proper charge in relation to this sum of money should have been of theft in terms of s 113 of the Criminal Law (Codification and Reform) Act [*Chapter 9*:23] which scenario would then have mandated the written consent of the Prosecutor General prior to the prosecution as a statutory safeguard against false or malicious allegations. It was improper to charge the accused person with unreasonable disposal of a sum of money when there was no evidence that such money was ever in existence by the time that the two were living together.

Moreover, we lament that it did not dawn to the learned trial magistrate that if at all this money had been in existence, still it was incumbent upon a trier of fact to exclude the possibility that it might as well have been taken by anyone else among the whole crew who loaded the items in the lorry including the complainant's new wife before the accused could be convicted. It just defies one's logic that all these other individuals who participated in loading the items would just all turn out to be holy saints to the complainant, the State representatives and the trial court while only the accused person would stand out to be accused of stealing the money. It is for these strong reasons that we take the view that the conviction of the accused person relating to the US$1 500 was improper and not only the conviction alone but the charge as well. In any event, we do not see how and why the alleged cash itself can properly be defined as part of '*household effects or other property*' in the context of s 3 (1)(k) of the Domestic Violence Act.

The final question is whether there were sufficient facts or evidence to prove the charge in relation to the furniture items that were admittedly taken by the accused from the house. Section 3 (1) of the Act provides thus:

"3 Meaning of domestic violence and its scope

(1) For the purposes of this Act, domestic violence means any unlawful act, omission or behaviour which results in death or the direct infliction of physical, sexual or mental injury to any complainant by a respondent and includes the following—

(a) physical abuse;

(b) sexual abuse;

(c) emotional, verbal and psychological abuse;

` *(d) economic abuse;*

(e) intimidation;

(f) harassment;

(g) stalking;

(h) malicious damage to property;

(i) forcible entry into the complainant's residence where the parties do not share the same residence;

(j) depriving the complainant of or hindering the complainant from access to or a reasonable share of the use of the facilities associated with the complainant's place of residence;

(k) ***the unreasonable disposal of household effects or other property in which the complainant has an interest;***" (Emphasis added)

In the first place, there was no evidence of any disposal of property. The evidence that is on record is that the accused person took the property to her own place of residence. There is no evidence that she got rid of it by selling or donating it to anyone. There was no evidence that the property is no longer available for all intents and purposes at law. The parties can still share those same items if a relevant civil suit is brought to court. The purpose of this legislative provision was to prevent a mischief whereby one of the spouses disposes of property by giving it away or selling it so as to dissipate family assets to the prejudice of another spouse or any family member. This provision could not have been formulated with a view to prevent a spouse who has separated from his or her spouse from taking some of the jointly owned assets so that she can use for his or her own comfort. Such a collection of items cannot be said to be a disposal and neither can it be labelled as being unreasonable. If the facts alleged in the case at hand in relation to the furniture items which were admittedly taken from the complainant's house were to constitute an offence, then every spouse or family member

who relocates from the family house or home would not be permitted to take anything therefrom and such would be absurd. In the case at hand, nothing showed that the accused's actions were unreasonable or unlawful as she took what was necessary for her own comfort and convenience since she was living at another place away from her husband even though she might have done it with a motive to spite her new rival in the marriage.

It is therefore on the basis of these considerations that we take the view that it is not only the order of restitution which is flawed but also the conviction itself. As far as the alleged missing sum of US$1 500 is concerned, the charge was wrong from the onset. In the result, both the conviction and the sentence must be vacated. I therefore order as follows:

1. The conviction of the accused person is hereby quashed and the sentence set aside on review.
2. The accused person shall be so advised by the trial court.

SIZIBA J

MUZENDA J agrees ___________________________